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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 458

WILLIAM B. ENGLAND, a. k. a. WILLIAM BENJAMIN ENGLAND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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To the United States Court of Appeals for the Seventh Circuit.

William B. England, also known as William Benjamin England, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above styled case on April 13, 1967, affirming the judgment of the United States District Court for the Eastern District of Illinois and the sentence of imprisonment of Petitioner for violation of 26 U. S. C., Section 7201. On June 8, 1967, the Court of Appeals denied a petition for rehearing.

CITATION TO OPINION BELOW.

The judgment of the United States Court of Appeals is printed in Appendix B, infra. The opinion of the United States Court of Appeals is also printed in Appendix B, infra, and is reported at 376 F. 2d 381.

JURISDICTION.

Petitioner was tried and convicted on a one count indictment charging him with violation of 26 U. S. C., Sec. 7201 in the United States District Court for the Eastern District of Illinois (R. 5). The District Court entered judgment and sentenced him to three years imprisonment. On April 13, 1967, the Court of Appeals for the Seventh Circuit entered its judgment affirming the judgment of the District Court. On June 8, 1967, the Court of Appeals denied a petition for rehearing. On June 26, 1967, the United States Supreme Court ordered that the time for filing a petition for a Writ of Certiorari be extended to and including August 7, 1967. Petitioner invokes the jurisdiction of this Court to review the opinion and judgment of the Court of Appeals by a writ of certiorari under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

I.

In a one count criminal tax evasion case where the tax assessments for the 3 years involved were made after the Statute of Limitations had run, whether the government could use Petitioner's execution of the government's Waiver of Restrictions form and its Offer in Compromise form as evidence of the filing of a fraudulent return to avoid the Statute of Limitations on the late assessment for one of the three years.

II.

Whether it was reversible error for the District Judge to submit to the jury evidence of taxes allegedly owed by Petitioner for a year where the assessment was outlawed by the Statute of Limitations along with evidence of taxes owed in two other years where the assessments were proper.

III.

In a Criminal Tax Evasion case whether Tax Assessment Sheets showing interest and penalties allegedly owed by taxpayer in addition to delinquent taxes may be received in evidence.

STATUTES INVOLVED.

Title 26 United States Code, Section 7201.

Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Title 26 United States Code, Section 6501.

Limitations on Assessment and Collection.

(a) General Rule.

"Except as otherwise provided in this Section, the amount of any tax imposed by this title shall be assessed within three years after the return was filed. . . ."

(c) Exceptions.

"1. False return—in the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time."

STATEMENT.

(All Record references are to pages in certified copy of Appendix of Defendant-Appellant in Court of Appeals unless otherwise noted.)

The one count indictment charged petitioner and his son, William Bernard England, with attempting to evade the payment of income taxes owed by petitioner for the years 1944, 1945 and 1946 in a total amount of $27,032.00 more or less, "duly assessed against the said William B. England (and his wife) on February 4, 1955", by concealing the ownership of two pieces of real property owned by petitioner in East St. Louis, Illinois, and by wilfully making false statements about that ownership between June 27, 1955 and November 27, 1962, so that the government could not levy on the property to secure payment of the back taxes, in violation of 26 U. S. C., Section 7201 (Appendix A).

The jury rendered a verdict of guilty against each defendant but the convictions were reversed and remanded for a new trial (R. 1). At this second trial, ending June 24, 1966, petitioner was found guilty by the jury and his son was acquitted (R. 2). Petitioner appealed and the Court of Appeals for the Seventh Circuit affirmed the conviction (Appendix B).

The Assessment of the back taxes for all three years was made on February 4, 1955 (R. 71, 72). The returns were timely filed (R. 14). Petitioner claimed, therefore, that the Statute of Limitations had run on these assessments while the government claimed that its evidence of petitioner's filing fraudulent returns for the three years permitted assessments at any time.

The government introduced evidence that petitioner pleaded guilty to another indictment in 1954 charging him with filing false returns for 1945 and 1946 (R. 77, 78).

Concerning the year 1944, the government's evidence of petitioner's waiving the statute or filing a fraudulent return consisted, among other things, of his execution of Government's Exhibit 3 (R. 73), received over objection (R. 10), this being a Waiver of Restrictions on Assessments, Form 870, dated November 16, 1954, on which petitioner allegedly consented to the assessment and collection of the claimed deficiencies for 1944, and which had the words "50% Fraud" typed above the penalty column of the form (R. 73). This form contained a statement at the bottom that the signing of the Waiver did not extend the statutory period for making the assessment (R. 73).

The government also introduced over objection (R. 20), Government's Exhibit 17 (R. 80), a government form entitled "Offer in Compromise", signed by petitioner, offering to settle his alleged deficiency for the year 1944 for the amount of $1200.00 (R. 80). This offer was later withdrawn, the withdrawals accepted (R. 30), and the $1200.00 accompanying the offer was credited to the petitioner's I. R. S. account (G. Ex. 1, R. 71). The latter was done pursuant to an authorization by petitioner upon the rejection of the compromise offer (R. 5b, Resp. Appendix).

Based on petitioner's execution of the Waiver form, the Offer in Compromise form and upon petitioner's authorizing Internal Revenue to apply the $1200.00 to his I. R. S. account, the Certificate of Assessments for 1944, Government's Exhibit 1 (R. 71), was admitted in evidence over objection (R. 10). The Court of Appeals held that such evidence was sufficient to permit the otherwise late assessment for 1944 (Appendix B).

At the trial, the government, over petitioner's additional objections, offered the Certificates of Assessments and Payments, Government Exhibits 1 and 2, for all three years involved and they were admitted in evidence against petitioner (R. 10, 71, 72), showing $27,032.00 in back taxes

due for the three years as well as interest and penalties totalling almost $30,000.00 more for the 3 years (R. 71, 72). Petitioner contended in the District Court and in the Court of Appeals that the introduction of these Assessment sheets, including amounts far in excess of the alleged liability charged in the indictment prejudiced his case before the jury, but his motion for a mistrial was denied (R. 11), in the district Court and the Court of Appeals held that permitting the jury to see the interest and penalty amounts on the Assessment Sheets did not prejudice petitioner (Appendix B).

REASONS FOR GRANTING THE WRIT.

I.

The decision of the Court below in the instant case that there was evidence of fraud in the 1944 return, allowing an assessment at any time, based on petitioner's signing the Government Waiver form (G. Ex. 3, R. 73) and executing an Offer in Compromise form (G. Ex. 17, R. 80) as well as authorizing the compromise offer to be applied to his alleged liability after the offer was withdrawn (R. 5b) is in conflict, so far as the Waiver is concerned, with the opinion of the 8th Circuit Court of Appeals in **Clark v. United States** (C. A. 8, 1954), 211 F. 2d 100, l. c. 105 (Appendix C).

The court in the **Clark** case stated that the execution of a Waiver, Form 870, was not entitled to any effect to convict a taxpayer on a criminal charge of evasion. While the Court did not reverse Clark's conviction because it was a non-jury trial and the District Judge attached no weight to the waivers as indicated in his findings of fact, in a jury case the conclusion is inescapable that this Waiver would not have been admitted, as it was here, over objection (R. 10), for any purpose, including the elimination of the Statute of Limitations.

If the Clark decision is correct, as we think it was, the court below in this case was wrong when it stated in its opinion that

> "The jury could properly have considered the signing of the waiver, consenting to an assessment of an increased tax and a fraud penalty, together with defendant's later conduct, as an admission of fraud in the 1944 return as well as of liability."

Settlement of the question by this court is plainly in the public interest, since the execution of a Form 870 Waiver is common practice in both civil and criminal tax investigations and whether it can thereafter be introduced in evidence in a criminal tax evasion trial should be finally determined.

The court below also held that the Offer in Compromise (G. Ex. 17, R. 80) signed by petitioner on Treasury Department Form 656, offering to settle the alleged 1944 liability for $1200.00 was additional evidence of the filing of a fraudulent return for that year (Appendix B). The form stated that the alleged violation was due to "Filing a fraudulent return for the year 1944." This and petitioner's authorization to I. R. S. to apply the tendered funds ($1200.00) to his tax liability, after the offer of Compromise was withdrawn (R. 5b) and the withdrawal accepted, constituted evidence of fraud to permit the late 1944 assessment to be received in evidence (R. 71, 10) according to the court below.

The opinion in **Ecklund v. United States** (C. A. 6, 1947), 159 F. 2d 81, conflicts with the holding of the Court of Appeals below that the Offer of Compromise was admissible for that purpose. This case seems to have established that in criminal cases offers of compromise or settlement, such as England, Sr.'s offer to compromise his 1944 tax liability, are inadmissible and of no evidentiary value.

Petitioner's offer in compromise (R. 80) and the assessment sheet for 1944 (R. 71) were received over petitioner's objection (R. 10, 20) and the Court of Appeals decision held that this was proper (Appendix B).

Since the Offer in Compromise form is so often used in tax negotiations and the court below has held, contrary to the **Ecklund** decision, that settlement offers are admissible in evidence, it would be in the public interest for this court to decide the question.

The Court of Appeals decision further held that it was evidence of the filing of a fraudulent return for 1944 that petitioner authorized Internal Revenue Service to apply the tendered funds to his tax liability when the compromise fell through (Appendix B). Since this authorization was all part of the compromise procedure and indeed the compromise form itself permitted the Government to retain the amount offered (R. 80), petitioner's conduct was beyond his control and a part of the settlement activity which the **Ecklund** case held inadmissible, contrary to the holding of the court below.

Inasmuch as the execution of these government forms by petitioner and his conduct in authorizing the retention of his settlement offer formed the sole basis for the finding that the 1944 returns were fraudulent and that therefore the Statute of Limitations did not apply to the 1944 assessment, there was no admissible evidence of a fraudulent return for that year and the Limitations Statute, 26 U. S. C. 6501, should have prevented the introduction of the 1944 Certificate of Assessments (G. Ex. 1, R. 71) when petitioner objected (R. 10).

Settlement of the questions above on the introduction of these widely used Revenue Service forms as evidence of fraud, particularly in view of the wording on Waiver Form 870 that its execution does not extend the statutory

period of limitation for assessment, is plainly in the public interest, since it is likely to come up in tax evasion cases wherever assessments are attempted long after the returns have been filed or where offers in compromise have been made.

II.

The opinion of the Court below infers that even if the evidence of tax liability for the year 1944 should have been excluded for lack of evidence that the 1944 return was fraudulent, it would make no difference because there was evidence of substantial tax liabilities for 1945 and 1946 (Appendix B).

Admitting that there was evidence of substantial taxes owed by petitioner in 1945 and 1946, if the 1944 taxes were outlawed by the Statute of Limitations (See Point I) the introduction of the Certificate of Assessments for that year, over objection (R. 10) clearly prejudiced the petitioner, according to the decision in **Flemister v. United States** (CA 5, 1958), 260 F. 2d l. c. 514, 518 (Appendix C). The language in the Flemister case seems directly to conflict with the language of the Court below in its opinion.

As a matter of fact in the Flemister case the Court held that submitting evidence of taxes due for a year barred by the Statute of Limitations was erroneous and prejudicial to the defendant on all counts even when that year formed the basis of a separate count in the indictment and the tainted evidence might be claimed to affect that count alone. In the instant case, where the 1944 tax charges were lumped in the same count as the charges for 1945 and 1946 it was clearly prejudicial. The decision of the Court below is believed to be erroneous and the conflicting decision of the Fifth Circuit Court of Appeals in **Flemister v. United States**, supra, to be correct.

III.

The decision of the Court below is believed to be erroneous on a question raised for the first time in this case. In order to show the amount of taxes owed by petitioner the Government introduced over objection (R. 10) the Certificates of Assessments and Payments (G. Exs. 1 and 2, R. 71, 72) along which Waiver Forms and Offers in Compromise discussed above, which showed $27,032 in taxes owed for 1944, 1945 and 1946 (the amount charged in the Indictment), and also showed a total of $29,268.39 in interest and penalties due for the three years.

Petitioner's motion for a Mistrial for permitting the jury to see these amounts claimed to be due in addition to the amount charged in the Indictment (Appendix A) was overruled (R. 11). The Court below held such disclosures not prejudicial (Appendix B).

The effect was that the jury received evidence that the petitioner owed far more to the government than the indictment charged and there was apparently no reason why the amounts of interest and penalties could not have been blocked out or masked on all of these exhibits. This is often done and the items were listed separately on the Assessment sheets (G. Exs. 1 and 2, R. 71, 72).

It should be noted in connection with this point that the exhibits referred to indicate that in the same period that England was charged in the indictment with evading payment of taxes totaling $27,032.00, he had paid to Internal Revenue Service or it had seized from him well over that amount (G. Exs. 1 and 2, R. 71, 72) chargeable first against tax deficiencies and then to interest and penalties (R. 18, 19). This was of course, less than the $56,300.37 owed according to the exhibits, interest and penalties making the difference. The payments were credited to the taxes (R. 18, 19) leaving only interest and penalties allegedly due.

Since petitioner was not charged with evading payment of interest and penalties the introduction of Exhibits showing these items was highly prejudicial to his defense and it is believed that the Court of Appeals opinion upholding this action by the District Court is of sufficient importance in this type of case to warrant the consideration of this Court in a hearing on the merits.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2, 1967.

APPENDIX